



panel hit him in the left side of his face and nose and left eye. The Office accepted that appellant sustained impingement of both shoulders, internal derangement of the right and left temporomandibular joints (TMJ), trigeminal neuralgia, cervical sprain, forehead contusion, Horner's syndrome, right corneal ulcer and somatoform pain disorder.<sup>1</sup> Appellant underwent several authorized surgical procedures of his facial area: reconstructive left and right TMJ surgery in December 1985, rhizotomy of the trigeminal nerve in July 1990 and two-band tarsorrhaphy of the right eye in August 1990. He also underwent authorized arthroscopic surgery, including rotator cuff debridement, of the right and left shoulders in April and May 1994.

In March 1991 appellant filed a schedule award claim for facial disfigurement due to his TMJ surgery. By letter dated June 15, 1993, the Office requested that appellant provide information regarding his claim. The Office requested that he complete the appropriate portion of an enclosed (Form CA-1094) and advised him of the need to obtain two photographs, taken within five days of the date of the application, each showing different views of his disfigurement fairly and accurately portrayed.

By letter dated June 15, 1993, the Office also requested that Dr. Luis Vasquez, an attending Board-certified neurosurgeon, provide information regarding appellant's facial disfigurement. The Office requested that Dr. Vasquez complete the appropriate portion of an enclosed Form CA-1094 and explained the requirements for processing a claim for facial disfigurement.<sup>2</sup>

In a report dated September 20, 1993, Dr. Vasquez stated that he had no opinion on appellant's facial disfigurement related to his TMJ surgery. He noted that, due to the trigeminal rhizotomy, appellant a right palpebral fissure that was three millimeters smaller than his left palpebral fissure. Dr. Vasquez stated that appellant had a left-sided Horner's syndrome with the left pupil smaller than the right, a circumstance which affected his ability to focus in dim light. He asserted that appellant's trigeminal rhizotomy caused decreased sensation in his right cornea and a permanent disfigurement in the form of anesthesia dolorosa in the right side of his face.

The Office did not receive any other evidence or information from appellant or Dr. Vasquez in response to its June 15, 1993 letters.<sup>3</sup>

By decision dated September 28, 1993, the Office denied appellant's claim for a schedule award for facial disfigurement. The Office noted that it had requested evidence from appellant

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<sup>1</sup> Appellant did not stop work immediately following the injury, but stopped work on June 19, 1985 after complaining of increased jaw pain and swelling. In March 1987 he returned to work in a temporary position and in September 1987 he was terminated from the employing establishment. Appellant received compensation from the Office for periods of total disability due to his accepted employment injuries.

<sup>2</sup> By letter dated July 16, 1993, the Office again asked Dr. Vasquez to send the information requested in its June 15, 1993 letter.

<sup>3</sup> The record contains two sets of head and shoulders photographs of appellant, but it appears that these were submitted in February 1987.

and his attending physician that was required to proceed with the claim, but that this evidence was not received.<sup>4</sup>

Appellant continued to seek medical treatment for his various medical conditions. In several reports dated in mid to late 1993, Dr. Thomas E. Alost, Jr., an attending Board-certified orthopedic surgeon, indicated that appellant exhibited shoulder problems, including tenderness across the anterior aspects of the shoulders, pain upon extremes of motion and positive impingement signs. In a report dated October 22, 2003, Dr. Alost stated that appellant's shoulder condition had reached maximum medical improvement.

In August 2003 appellant filed a claim for a schedule award due to permanent impairment of his upper extremities related to his February 7, 1985 employment injury. In September 2003, the Office requested that he obtain medical evidence from an attending physician which contained description of the claimed impairment.

In October 2003 appellant again asserted that he was entitled to a schedule award for facial disfigurement due to his TMJ surgery. He submitted an October 30, 2003 report in which Dr. Vasquez discussed the neurological condition of his face, including ptosis of the eye, droop of the right lip and diminished sensation related to right trigeminal nerve damage. Dr. Vasquez indicated that providing an impairment rating was beyond his medical expertise. Appellant also resubmitted a copy of Dr. Vasquez' September 20, 1993 report.

Appellant submitted a November 11, 2003 report in which Dr. Charles Zaltz, an attending Board-certified orthopedic surgeon, noted that he had not seen appellant in several years and that he referred appellant to Norman McDonald, a physical therapist, for measurement of his shoulder motions. Dr. Zaltz stated that the enclosed record of the physical therapist showed that some of the measurements did not meet "the validity consistency criteria." Regarding the degree of impairment, he stated: "He is going to retain a whole person impairment of about five percent" based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In an enclosed November 3, 2003 report, Mr. McDonald indicated that appellant had the following shoulder motions: 20 degrees of right extension, 15 degrees of right adduction, 60 degrees of right internal rotation, 45 degrees of right external rotation, 30 degrees of left extension and 20 degrees of left adduction. He stated that appellant "did not meet validity/consistency criteria" for the following motions: right flexion, right abduction, left internal rotation, left external rotation, left flexion and left abduction. Mr. McDonald concluded that appellant had a six percent permanent impairment of his right arm, a two percent permanent impairment of his left arm and a five percent impairment of his whole body based on the standards of the A. M. A., *Guides* (5<sup>th</sup> ed. 2001).

By letter dated November 23, 2004, the Office requested that appellant complete the appropriate portion of an enclosed Form CA-1094 and advised him of the need to obtain two photographs, each showing different views of his facial disfigurement. The Office informed

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<sup>4</sup> The Office noted that the September 20, 1993 report of Dr. Vasquez was not sufficient to provide an opinion on appellant's facial disfigurement.

appellant that he should then take the form to his attending physician, with the photographs attached and have the physician complete the second page of the form.

By decision dated December 23, 2004, the Office denied appellant's claim for a schedule award for facial disfigurement indicating that appellant did not submit evidence showing that he was entitled to such a schedule award. It noted that Dr. Vasquez stated in his October 30, 2003 report, that he could not provide an opinion on disfigurement.

In a report dated January 13, 2005, the Office district medical adviser determined that appellant had a six percent permanent impairment of his right arm and a two percent permanent impairment of his left arm. The Office district medical adviser indicated that appellant's total right arm impairment was obtained by adding the following impairment ratings related to limitation of right shoulder motion: 2 percent for 20 degrees of extension, 1 percent for 15 degrees of adduction, 2 percent for 60 degrees of internal rotation and 1 percent for 45 degrees of external rotation. He noted that appellant's total left arm impairment was obtained by adding the following impairment ratings related to limitation of left shoulder motion: 1 percent for 30 degrees of extension and 1 percent for 20 degrees of adduction.

By award of compensation dated February 8, 2005, the Office granted appellant a schedule award for a six percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.

### **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees' Compensation Act<sup>5</sup> provides in section 8107(c)(21) that "[f]or serious disfigurement of the face, head or neck of a character likely to handicap an individual in securing or maintaining employment, proper and equitable compensation not to exceed \$3,500[.00] shall be awarded in addition to any other compensation payable under this schedule."<sup>6</sup> In a case involving disfigurement, the question before the Board is whether the amount awarded by the Office was based upon sound and considered judgment and was "proper and equitable" under the circumstances as provided by section 8107(c)(21) of the Act. In determining what constitutes "proper and equitable compensation" for disfigurement, sound judgment and equitable evaluation must be exercised as to the likely economic effect of appellant's disfigurement in securing and maintaining employment.<sup>7</sup>

According to Office procedure, a claimant for a schedule award for facial disfigurement must complete the front of a Form CA-1094 while the attending physician should complete the

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8107(c)(21).

<sup>7</sup> *Mark A. Wages*, 39 ECAB 282, 287 (1987).

reverse of the form.<sup>8</sup> With the Form CA-1094, the claimant must submit two photographs taken within five days of the date of the application, each showing different views of the disfigurement fairly and accurately portrayed.<sup>9</sup> After the required evidence has been gathered, the case should be referred to the Office district medical adviser for additional evaluation to include personal examination of the claimant by Office officials.<sup>10</sup>

The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time possible. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>11</sup> The Board will not interfere with or set aside a disfigurement determination of the Office unless it is clearly in error.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

On February 7, 1985 a plywood ceiling panel hit appellant in the left side of his face and nose and left eye while he was at work. The Office accepted that he sustained impingement of both shoulders, internal derangement of the right and left TMJ, trigeminal neuralgia, cervical sprain, forehead contusion, Horner's syndrome, right corneal ulcer and somatoform pain disorder. Appellant underwent several Office-authorized surgeries of his facial area and shoulders.

By decision dated September 28, 1993, the Office denied appellant's claim for a schedule award for facial disfigurement. Appellant later requested that the Office again consider his schedule award claim and, by decision dated December 23, 2004, the Office again denied the claim.

The Board finds that the Office properly denied appellant's claim for a schedule award for facial disfigurement. Appellant failed to submit evidence showing that he was entitled to such a schedule award. As noted above, a claimant for a schedule award for facial disfigurement must complete the front of a Form CA-1094, arrange for an attending physician to complete the appropriate portion of the same form and submit two photographs taken within five days of the date of the application, each showing different views of the disfigurement.<sup>13</sup> Despite the fact that

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<sup>8</sup> Office (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.8b (August 2002). An award for disfigurement should not be considered until at least 6 to 12 months after the last medical treatment. *Id.* at Chapter 2.808.8a. A claimant who is permanently and totally disabled because of an employment-related injury is not entitled to a disfigurement award. *Id.* at Chapter 2.808.8.

<sup>9</sup> *Id.* at Chapter 2.808.8c.

<sup>10</sup> *Id.* at Chapter 2.808.8d.

<sup>11</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>12</sup> *Matthew Leonka*, 38 ECAB 119, 121 (1986).

<sup>13</sup> *See supra* notes 8 and 9 and accompanying text.

the Office advised appellant of these requirements and provided copies of a Form CA-1094, he did not submit the required evidence and information to the Office.<sup>14</sup> Therefore, it properly found that there was no basis to grant appellant a schedule award for facial disfigurement.

The Office, in determining that appellant was not entitled to a schedule award for disfigurement, took into consideration the proper factors and circumstances and made a sound and considered judgment, which was proper and equitable under section 8107(c)(21) of the Act and which did not demonstrate clear error.<sup>15</sup> The Office did not abuse its discretion in determining that appellant was not entitled to a schedule award for disfigurement.

### **LEGAL PRECEDENT -- ISSUE 2**

The schedule award provision of the Act<sup>16</sup> and its implementing regulation<sup>17</sup> sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>18</sup>

An employee who claims benefits under the Act has the burden of establishing the essential elements of his or her claim.<sup>19</sup> The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that he or she is entitled to compensation.<sup>20</sup> However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>21</sup>

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<sup>14</sup> Appellant submitted an October 30, 2003 report of Dr. Vasquez, an attending Board-certified neurologist, who indicated that providing an impairment rating was beyond his medical expertise. Moreover, the Board notes that, prior to the September 28, 1993 denial of appellant's earlier disfigurement schedule award claim, the Office also advised him of his responsibility concerning the completion of a Form CA-1094 and the provision of photographs. However, appellant did not adequately respond to the Office's requests at that time. He submitted a September 20, 1993 report of Dr. Vasquez at that time, but this report did not serve to establish his claim.

<sup>15</sup> The Office also stated that appellant was not entitled to a disfigurement award because he was permanently and totally disabled due to an employment-related injury. This assessment appears reasonable as appellant had been totally disabled due to his employment injury since 1987. *See supra* note 8.

<sup>16</sup> 5 U.S.C. § 8107.

<sup>17</sup> 20 C.F.R. § 10.404 (1999).

<sup>18</sup> *Id.*

<sup>19</sup> *Ruthie Evans*, 41 ECAB 416, 423-24 (1990); *Donald R. Vanlehn*, 40 ECAB 1237, 1238 (1989).

<sup>20</sup> *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

<sup>21</sup> *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

## ANALYSIS -- ISSUE 2

As noted, the Office accepted that appellant sustained impingement of both shoulders due to a February 7, 1985 employment injury and it authorized the performance of bilateral shoulder surgery. By award of compensation dated February 8, 2005, the Office granted appellant a schedule award for a six percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.

The Office based its upper extremity schedule award on a January 13, 2005 report of the Office district medical adviser and a November 11, 2003 report of Dr. Zaltz, an attending Board-certified orthopedic surgeon. He addressed the findings of November 3, 2003 range of motion testing obtained by Mr. McDonald, a physical therapist. The Board finds, however, that due to certain deficiencies in these reports, the case requires further development to determine the extent of appellant's upper extremity impairment.

Dr. Zaltz acknowledged that he had not seen appellant in several years. He briefly made reference to the range of shoulder motion findings obtained by Mr. McDonald on November 3, 2003 and generally indicated that some of the measurements did not meet "the validity consistency criteria."<sup>22</sup> Dr. Zaltz did not, however, provide a clear opinion that the test results obtained by Mr. McDonald represented appellant's medical condition with respect to his range of shoulder motion, nor did he provide any further comment regarding Mr. McDonald's finding that some of the shoulder motions were not valid. Dr. Zaltz stated that appellant "is going to retain a whole person impairment of about five percent" but he did not provide any further elaboration regarding the degree of appellant's impairment.<sup>23</sup>

In a January 13, 2005 report, the Office district medical adviser determined that appellant had a six percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.<sup>24</sup> However, given the described deficiencies in Dr. Zaltz' evaluation, particularly the lack of a clear medical opinion that the November 3, 2003 range of motion findings represent appellant's upper extremity condition, the Office district medical adviser impairment rating appears premature. The medical opinion regarding the permanent impairment of appellant's upper extremities must be considered incomplete and insufficient based on the issue raised concerning the validity of the findings. While appellant has the burden to establish

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<sup>22</sup> In his November 3, 2003 report, Mr. McDonald indicated that appellant had the following shoulder motions: 20 degrees of right extension, 15 degrees of right adduction, 60 degrees of right internal rotation, 45 degrees of right external rotation, 30 degrees of left extension and 20 degrees of left adduction. Mr. McDonald also noted that appellant "did not meet validity/consistency criteria" for right flexion, right abduction, left internal rotation, left external rotation, left flexion and left abduction.

<sup>23</sup> The Board notes that a schedule award is not payable under section 8107 of the Act for an impairment of the whole person. See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990). Mr. McDonald concluded that appellant had a six percent permanent impairment of his right arm, a two percent permanent impairment of his left arm and a five percent impairment of his whole body. However, in addition to the fact that schedule awards are not payable for the whole person, physical therapists are not physicians under the Act and are not qualified to provide medical opinions. *Jane A. White*, 34 ECAB 515, 518-19 (1983).

<sup>24</sup> He applied the range of motion values obtained by Mr. McDonald to several figures in the A.M.A., *Guides*. See A.M.A., *Guides* 476-79, Figures 16-40 through 16-46.

entitlement to schedule award compensation, the Office shares responsibility in the development of the evidence.<sup>25</sup> Therefore, the case will be remanded to the Office for further development of the evidence regarding the extent of the permanent impairment to appellant's upper extremities. After such development it deems necessary, the Office should issue an appropriate decision on this matter.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's claim for a schedule award for facial disfigurement. The Board further finds that the case is not in posture for decision regarding whether appellant has more than a six percent permanent impairment of his right arm and a two percent permanent impairment of his left arm and the case should be remanded to the Office for further development and an appropriate decision on this matter.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' December 23, 2004 decision is affirmed and the February 8, 2005 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 3, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>25</sup> See *supra* note 20 and accompanying text.